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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-816

DUN & BRADSTREET, INC., a Delaware corporation,
Petitioner,

v.

KANSAS ELECTRIC SUPPLY COMPANY, INC.,
a Kansas corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December 20, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Dun & Bradstreet, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit (— F.2d —) filed in the above entitled case on September 20, 1971.

OPINIONS BELOW

The Tenth Circuit Opinion is included herein in Appendix A, *infra,* pages — —. This Opinion is reported at — F.2d — (C.A. 10, 1970).

JURISDICTION

The judgment of the Tenth Circuit was filed on September 20, 1971. Issuance of the mandate was stayed to and including December 20, 1971 or until action by this Court following a petition for certiorari. The jurisdiction of this Court is invoked under 28 USC § 1254(1). The basis of jurisdiction in the District Court was 28 USC § 1332(a).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that an involuntary petition in bankruptcy filed in a United States District Court against a company of substantial size and importance is not a matter of "real public interest" within the meaning of this Court's decisions in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811 (1971)?

2. Did the Court of Appeals err in holding that financial reports published by a company which distributes those reports to a list of subscribers are not entitled to the same constitutional protection in libel actions that is afforded less specialized news media which often publish similar information and sometimes make errors similar to the error which occurred in the case at bar?

3. In a libel action brought against the publisher of credit reports, does the First Amendment require, at least, that actual harm or special damages causally related to the published report must be shown as a prerequisite to recovery?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

PRELIMINARY STATEMENT

This case squarely presents issues as to the limitation, if any, of the doctrine of *New York Times* v. *Sullivan*, 276 U.S. 254, 84 S. Ct. 710 (1964). The issues are presented in a commercial context of the greatest importance to the American public, business and finance, and the basic issues have not heretofore been presented to and considered by this Court.[1]

The facts are simple. An experienced employee of Dun & Bradstreet, Inc. (D&B) prepared, from the records of the bankruptcy court, a report stating that an involuntary petition in bankruptcy had been filed

[1] In a factually similar case, *Greer* v. *Dun & Bradstreet, Inc.*, October Term, 1971, No. 71-206, this Court denied certiorari. But in that case the only question presented was whether a state libel judgment was unconstitutional solely because the jury returned a general verdict for the plaintiff, but found that no special damages had been suffered. The sole question presented by the petition was stated as follows:

> "In a libel case against a credit reporting agency which furnishes credit information to subscribers at their request on a business in which said subscribers are interested, should not a judgment for presumed damages be reversed as violative of the First and Fourteenth Amendments of the United States Constitution where the jury in its verdict specifically found that plaintiff suffered no special damages?"

against plaintiff. The report was processed by the employee's supervisors in accordance with long-established procedures and was sent by D&B to subscribers. The report was erroneous due to an incorrect reading or reporting of the court record. On the next day, D&B corrected the error by telephone and teletype to all subscribers. About a year later plaintiff filed the present action for libel. Under Kansas common law, the case was tried on the theory that the publication was "libel per se".

First, if a general-circulation publication like the New York Times innocently published the mistaken news that bankruptcy proceedings had been filed against a particular corporation, would the doctrine of the *Sullivan* case apply? (The New York Times regularly publishes such information in its "Business Records" column and elsewhere, and, as we show in Appendix D, from time to time erroneous reports like that involved in this case are published (See *infra* and Appendix D)). The initial question presented, then, is whether despite the essentiality of commercial information to the conduct of the Nation's trade and commerce, the fact that it is *commercial* information rather than general news like the erroneous story of the tragic experience of a family in *Time, Inc.* v. *Hill*, 385 U.S. 374, 87 S. Ct. 534 (1967), or the libel of a candidate for county tax-assessor in *Ocala Star-Banner Co.* v. *Damron*, — U.S. —, 91 S. Ct. 528 (1971), excludes its publication from the First Amendment's guarantees of freedom of speech and of the press?

Second, does the First Amendment's protection extend only to media of general circulation like newspapers, magazines and radio or television stations, or does it also apply to specialized publications sold only

to subscribers? Examples of such specialized publications range from Dun & Bradstreet financial reports on individual companies, the recipients of which may number in the many hundreds or thousands, to such widely distributed commercial publications as Moody's Manuals, the Value Line Investment Survey, and Standard & Poor's reports which are sold only to subscribers, and essentially political or current-events publications like the Kiplinger Letter which is also sold only to subscribers.

There is no question that the judgment below must be reversed if, contrary to the judgment of the Tenth Circuit, *New York Times* v. *Sullivan* applies to this case. The Kansas common law of libel was applied. *New York Times* standards were specifically excluded. There was a finding of no special damages; yet punitive and general damages were assessed under instructions and facts that virtually made the publisher an insurer of the accuracy of its publication. The instructions stated that proof of defendant's "intent" is not necessary (Instruction No. 10); that a finding of negligence is not essential (Instruction No. 9); that motive and purpose of the defendant, its belief or knowledge of falsity are not to be considertd in respect of general damages (Instruction No. 21); that general damages are "presumed" to flow from defendant's act (Instruction No. 18); and that punitive damages may be assessed as "punishment and a warning to others" (Instruction No. 20) (See Appendix B).

If the *New York Times* standard had been applied in this case, on the basis of any of the various views expressed by Justices of this Court, a judgment for general or punitive damages could not possibly have been supported. This is a case in which the error was

innocently made by an experienced employee who followed procedures, the validity and reliability of which are attested to by long usage and the preeminence of D&B in the field,[2] but who misread a court record. The error was corrected on the very next day following publication.

We respectfully submit that this Court should grant certiorari in this case. The interests of the people of this Nation in the free flow of information is not circumscribed by political questions relating, for example, to the qualifications of candidates for public office or the actions of office-holders or the policing of allegedly obscene literature, or by the public's literary or entertainment interest in a dramatic story centering on a crime (*Time, Inc.* v. *Hill*). Reports of the financial condition of companies are of general concern to the public, to existing and potential creditors and customers, and to the millions of Americans who invest in business enterprises. The freedom, or "breathing space" afforded publications which inform the public on such matters cannot and should not be confined to news media of general circulation. There is no such restriction in the First Amendment; and in fact, the important function of providing information in many essential fields is principally performed by specialized publications such as that of defendant herein, rather than by the general news media.

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[2] The sophisticated audience and the competitive nature of the business of publishing credit reports operate as self-corrective factors which tend to reduce some of the problems incident to application of the *New York Times* doctrine. In order to maintain its reputation and position of preeminence, D&B, which began issuing credit reports in 1841, has continuously refined its reporting procedures. At present, according to the New York Times of February 25, 1971 (p. 53), D&B reports on about 3 million American and Canadian companies and has some 85,000 subscribers. The company does not report on individuals except for a small number of reports about individuals seeking mortgages.

STATEMENT

On April 14, 1964, at approximately 4:05 P.M., Mrs. Roberta Adkins, an employee of Dun & Bradstreet, Inc., visited the United States District Courthouse in Topeka, Kansas pursuant to a regular routine which this employee had been following on a daily basis since 1959. Upon the occasion of this visit the clerk showed her a petition in bankruptcy which had been filed that same day and she copied down some information contained in the petition. Returning immediately to the D&B office in Topeka, she telephoned D&B's office in Kansas City, Missouri, and reported that Kansas Electric Supply Co., Inc., had been the subject of an involuntary petition in bankruptcy. Kansas Electric, a large and important wholesaler of electrical supplies in Topeka, with subsidiaries in three other cities, had for some time been the subject of D&B financial reports published periodically. In addition, Kansas Electric is rated in the "D&B Reference Book" for its area, which book is revised every two months. This "Reference Book" is furnished to every subscriber whose subscription covers the particular geographical area in which Kansas Electric is located.

The head of the Kansas City office who received Mrs. Adkin's telephone call asked if she were certain of the accuracy of her report. When he received an affirmative answer from a person who, according to the record, in her five years of employment had never before made a mistake in reporting, the head of the Kansas City office transmitted the report to the appropriate D&B employee who was to examine it further and determine whether to prepare a special notice of the petition in bankruptcy and if so, to transmit that

notice to the D&B subscribers who had requested reports on Kansas Electric.[3]

The employee assigned to review the report consulted previous D&B reports about Kansas Electric, noticed that the company's assets were heavily concentrated in accounts receivable, and that the company had a history of slowness in meeting its financial obligations. On this basis he reasonably concluded that the bankruptcy petition had been filed by some impatient creditors. The notice was then prepared and mailed on the evening of April 14, 1964.

The next morning, April 15, 1964, D&B's Kansas City office learned through a telephone call from a subscriber who had received the notice that the information received from Topeka was in error. Kansas Electric had not been the subject of an involuntary petition in bankruptcy; instead, Kansas Electric had been a petitioning creditor in an action filed against another company. In taking down the facts from the petition filed in Topeka, Mrs. Adkins had inadvertently reversed the names.

Immediately upon verifying that an error had been made, the Kansas City office initiated a correction procedure. On April 15, the very next day following the erroneous notice, each of the subscribers to reports on Kansas Electric who had received the erroneous notice was notified of the error by telephone or teletype messages. In a few instances D&B even succeeded in intercepting the erroneous notice before it reached a subscriber.

The very next day, April 16, 1964, correction notices were also mailed to all of the subscribers who had

[3] Except for the prompt discovery and correction of the error, *infra*, the information would have been reflected in the widely distributed regional D&B "Reference Book".

already received telephone or teletype correction notices. In addition to the 38 subscribers to reports on Kansas Electric, at the request of Kansas Electric, D&B also sent correction notices to some 135 companies designated by Kansas Electric, who were not D&B subscribers and who had not received the original notice, but who Kansas Electric presumably concluded would have received word of the erroneous report.

On April 17, 1964, D&B issued a full, revised report which was sent to all subscribers who had expressed an interest in Kansas Electric. This report again counteracted any possible misapprehension and supplied the most current available financial information about the company.

Kansas Electric filed suit against D&B on March 29, 1965, alleging that the special notice describing the petition in bankruptcy was libelous. The case was tried on the common law theory that the notice was libel per se. At trial, Kansas Electric was unable to prove a single instance in which credit was restricted or business lost as a result of the erroneous notice. To the contrary, credit managers for numerous companies dealing with Kansas Electric uniformly testified that the notice had no effect upon their business relationship with Kansas Electric, and the jury, responding to a specific interrogatory put to it, returned a verdict of no special damages. Kansas Electric showed only a general decline in its overall profits, a decline which had begun prior to the D&B notice and which continued afterwards and which was not shown in any way to be the result of D&B's quickly corrected error.

The case was tried under the Kansas common law of libel since the state has no governing statute. The instructions to the jury were later held by the Court

of Appeals to be proper under Kansas law since *New York Times* v. *Sullivan*, according to both the trial and appellate courts, did not apply. The jury was first instructed that the erroneous notice issued by defendant is "libelous" since it would injure plaintiff's credit standing (Instruction No. 7). It was advised that the type of report issued by defendant is "conditionally privileged" (Instruction No. 8), but that this conditional privilege would be overcome if the jury found on a "preponderance of the evidence" that the report in this case was issued with "malice". "Malice" according to the Court of Appeals, was properly defined in accordance with Kansas law as set forth by the trial court in Instructions 9 and 10 which the Court of Appeals quoted in full.[4] We

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[4] "Instruction No. 9: You are instructed that you may find defendant was actuated by malice if, in issuing the special notice, defendant acted not in good faith but in bad faith toward plaintiff, and with an intent to injure plaintiff in its business, or in willful, wanton and reckless disregard of the rights and interests of plaintiff. If you find that the special notice was disseminated by defendant with malice, as that term is above defined, then the "conditional privilege" is abused and not applicable, and you must find for plaintiff. The burden of proof is upon the plaintiff to establish by *a preponderance of the evidence* that defendant was actuated by malice as heretofore explained. *While this is not a case in which liability of the defendant arises from proof of defendant's negligence, you may consider, among other facts in the evidence, whether the erroneous report given by defendant to its subscribers was a result of negligent investigation of the records of this Court in determining whether defendant acted in willful, wanton, and reckless disregard of the rights and interests of plaintiff.*"

"Instruction No. 10: You are instructed that a willful, wanton, and reckless act is one indicating an intentional, reckless disregard and complete indifference and unconcern for the probable consequences of the act. Recklessness is an indifference to the

set these forth in the margin. The parts we have italicized, in our opinion, demonstrate that the jury might well have concluded that it should return a verdict against defendant for the sole reason that its report was erroneous because of an employee's mistake, without reference to knowledge of falsity or reason to doubt accuracy.

On the question of damages, the jury was instructed that general "*damages arise by inference of law* and are not required to be proved by a showing of specific harm since the law presumes such damages to necessarily flow from a malicious dissemination of libelous information." (Instruction No. 18). Punitive damages, the jury was advised, are to be gauged "as punishment and as a warning to others against similar conduct. (Instruction No. 20). (Italics added).

The jury returned a verdict for Kansas Electric. It expressly found no special damages, but awarded $100,000 general damages and $50,000 punitive damages. In due course judgment was entered.

PROCEEDINGS BEFORE THE DISTRICT COURT

The questions of law which petitioner now seeks to raise before this Court were first dealt with by the District Court. In a pre-trial ruling dated September 10, 1968, the trial court held: "We are dealing with a situation arising in the area of commercial business transactions where the damage to the credit standing

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rights of others and an indifference of whether wrong or injury is done.

"*It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff.*"

of a business enterprise, a matter in which the public has little interest or direct concern, becomes the gist of the action". The case was thereafter tried under common law rules of libel and the jury was not instructed under the rules of *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 254 (1964). In response to a post-trial motion to set aside the verdict, which, at great length, argued the applicability of *New York Times* v. *Sullivan*, the District Court expressly reaffirmed the position which it took in its pre-trial rulings, and again stated that in the instant case, the common law of Kansas and not the standards of *Sullivan* and later cases of this Court, controls.

PROCEEDINGS BEFORE THE TENTH CIRCUIT

The Tenth Circuit addressed itself to the question of the applicability of the rule of law of *New York Times* v. *Sullivan*, 376 U.S. 254, 74 S. Ct. 254 (1964), and its progeny to the instant case and adopted the position which the Third Circuit had taken in *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433 (CA 3, 1971).[5] The Tenth Circuit held that the New York Times rule does not apply and that the absence in a commercial libel case of any proof of " 'actual malice' as required by and as defined in *New York Times*" is immaterial. Its reasoning was that (1) the business or credit standing of Kansas Electric is not a matter of "real public interest"; and (2) a publication "which provides specialized information to a selective, finite audience is not a medium entitled to the extended constitutional protection provided by the *New York Times* and its successor cases." (Appendix A)

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[5] As stated above, in *Grove*, a petition for certiorari, filed in this Court and denied by it, urged only the point of alleged unconstitutionality of a state libel judgment where there was no finding of special damages.

Petitioner respectfully submits that the Court of Appeals erred in both of these rulings.

(1) The D&B special notice was a report about the institution of an important proceeding in a federal court, a matter which is always of general public interest.

(2) The notice related to a reported bankruptcy proceeding against a large wholesaler of electrical supplies to contractors, builders and retailers. The plaintiff is itself located in Topeka, Kansas, with affiliates under the same ownership, in three other cities. It has a net worth of $300,000 to $500,000 and its 1964 sales were in excess of $1,000,000. Its financial condition was unquestionably a matter of great interest and concern to its 1,600 customers, its suppliers and to the general public in the areas served which looked to it for supplies for home and office building construction projects, retail supplies and other purposes. We submit that a report on Kansas Electric, a company of substantial concern to its community and the suppliers and customers with which it deals, is a matter of "public interest and concern" for purposes of the First Amendment.

(3) The public interest protected by the First Amendment cannot be circumscribed or defined by reference to the scope or generality of the publication. A small newspaper, circulating to a few dozen or hundred subscribers, is entitled to the same protection afforded the New York Times. And a specialized publication, like the D&B reports or, indeed, an "insider" political letter, is no less entitled to the uninhibited circulation of information and ideas to a specially-concerned audience than a newspaper of general circulation. (See *infra*) Indeed, subscribers to Dun & Bradstreet are likely to be more dependent upon the D&B reports, for needed information than

are readers of the New York Times for new. The D&B report may be the only available source of the needed information whereas news is generally available in alternative media. Nor can the importance of a publication be measured only by the number of subscribers, because, as the plaintiff contended below in this case, the information that is circulated to specific subscribers becomes disseminated to a wide audience. After all, some of the roots of the First Amendment lie in the need to protect political broadsides and pamphlets which were undoubtedly of limited circulation.

REASONS FOR GRANTING THE WRIT

I.

This case clearly presents the question of definition of issues of public or general concern which the First Amendment protects.

In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811 (1971), this Court put to rest the argument that the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 254 (1964), applies only to "public officials" or "public figures". The plurality opinion stated: ". . . we think the time has come to forthrightly announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases".

Petitioner submits that the D&B publication leading to the case at bar reported on a matter which is of general concern for two distinct reasons:

(1) It reported the initiation of a public court proceeding; and

(2) The report contained data of real significance to a substantial section of the public and the business community.

Institution of a proceeding in a United States District Court is undoubtedly a matter of general concern. The public has a right to know about each and every proceeding in its courts.

Initiation of bankruptcy proceedings is, especially, a matter that ought to receive wide publicity. Its publication and circulation should not be impeded or inhibited by the peril of large judgments if an innocent error is made. Present and potential creditors, customers, suppliers, users of the company products, employees and investors are all vitally concerned. The D&B publication which simply reported that a petition in bankruptcy had been filed was clearly a report involving a matter of general concern to a large number of people.

Kansas Electric is obviously a company whose financial condition is of great concern to the communities in which it operates. Its operations are intimately tied to the operations of other companies and to people and public agencies concerned with construction and maintenance of housing and office buildings. As a wholesaler of electrical supplies it is a customer of numerous manufacturers and a supplier to numerous retailers and electrical contractors.

Reports like those published by D&B are an integral part of the fabric of national commercial communication which provides the financial data upon which business and public decisions, such as the selection of suppliers and the extension or limitation of credit, are based. Often reports like those published by D&B are

the only available source of relevant and essential data. The free flow of information necessary to business decisions certainly is no less important than the free flow of dramatic reporting about of a play based on a flow of dramatic reporting about a play based on a real-life incident, *Time, Inc.* v. *Hill*. It is of at least comparable importance to a statement about alleged activities of an employer in a local union election campaign.[6]

In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 1818 (1971), the plurality opinion of this Court stated: "Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than polities in a narrow sense. 'The guarantees for speech and press are not the preserve of political expression or comment upon public affairs'. *Time, Inc.* v. *Hill*, 385 U.S. at 388, 87 S.Ct. at 542. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of

[6] This Court has indicated that such statements are entitled to the protection of the doctrine of *New York Times* v. *Sullivan*. *Cf. Linn* v. *United Plant General Workers of America*, 383 U.S. 53, 65, 86 S.Ct. 657 (1966).

their period.' *Thornhill* v. *Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1941)."

Certainly to the extent that a company seeks the trust of the public and the business community in which it functions it exposes itself to the circulation of information as to whether that trust should be given and to continuing reporting of whether that trust should be continued.

Publications which have unquestionably general circulation regularly publish information identical to the information contained in the D&B report which occasioned the instant action. The New York Times, for example, regularly features an item entitled "Business Records" which lists bankruptcy proceedings, both voluntary and involuntary, filed in federal courts in the New York area as well as "assignments in bankruptcy" filed in the state courts. In Appendix D, we set forth recent incidents in which acknowledged errors of potentially serious consequences appeared in the New York Times "Business Records" and elsewhere in the Times as a result of inadvertent confusion of the parties to the action or the type of action, or incorrect reporting of figures. (Two of the examples disclose material understatements by the Times of D&B's earnings, which the Times subsequently corrected.) We can see no reason for denying to this type of error the protection of the *New York Times* doctrine.[7] But in the case at bar, D&B has been

[7] Certainly such errors should be afforded the same protection given the newspaper in *Ocala Star-Banner Co.* v. *Damron*, — U.S. —, 91 S.Ct. 628 (1971). In that case the defendant newspaper, because of an error like that in the present case, incorrectly reported that the plaintiff, a candidate for county tax-assessor, had been indicted for perjury. The paper was exonerated on the basis of *New York Times* v. *Sullivan*.

held liable for $150,000 for an inadvertent error of the same sort. Both the errors in "Business Records" and the error in the instant case involve the publication of information of public concern. Yet presumably, a plaintiff in a libel action brought against the New York Times must meet the severe standards of the First Amendment. It must, according to the decisions of this Court, produce sufficient evidence to show with convincing clarity that a defendant in fact "entertained serious doubts" as of the truth of his publication, *St. Amant* v. *Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968), *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 1826 (1971), or, according to more restricted views of the doctrine, it must at least show that the challenged statement was published without a good-faith basis. A plaintiff must also show specific measurable harm flowing from the publication. None of these elements exist in this case. This was "hot news", obtained from court records by an experienced employee and published on the basis of procedures which were time-tested and which had produced accurate results in literally millions of instances.

The rule of the Tenth Circuit in this case invites precisely the inhibition of publication of vital information which the First Amendment and all Justices of this Court who have expressed themselves on the subject, have been solicitous to prevent; specifically, the subjecting of reporting to hazards of such formidable proportions that, in the case of commercial or financial reports, the risks involved may be so great that the publication of such reports may be confined to relatively few companies on a prohibitively expensive basis so that a vast segment of our economy and the public will be denied access to this essential information. The

First Amendment is not confined to political, literary or prurient subject-matters. It does not grant freedom to them and deny it to commercial information.

II.

This case calls upon this Court to address itself to the question of whether the First Amendment protections enunciated in *New York Times* v. *Sullivan* and its successor cases are available to publications circulated to a restricted list of subscribers.

A subscriber to D&B's service typically may sign a contract which requires him to pay an annual subscription price. In return, he receives a "Reference Book" listing all of the companies in the prescribed region about which D&B publishes reports and the right to receive 100 reports on specific business enterprises. The subscriber from time to time designates the companies in which he is interested and receives, on a continuing basis, the reports periodically published by D&B about the designated companies. All subscribers who designate a particular company receive the same reports about the business and financial condition of that company.

The Tenth Circuit held that because D&B provides "specialized information to a selective finite audience [it] is not a medium entitled to the extended constitutional protection provided by *New York Times* and its successor cases." Petitioner respectfully submits that this ruling is clearly erroneous. There is no reason to distinguish between a publication which provides information on numerous subjects to an audience that may be interested in one or more of the subjects covered and a publication which provides information

relating to a single topic to a limited number of subscribers specifically interested in that topic.

In the first place, as the present case illustrates, the number of subscribers does not delineate or define the number of interested people who are reached by the published information. Subscribers are merely the immediate recipients of the information and not the totality of the persons who are ultimately benefitted by it.

Some idea of the scope of the problem that arises by defining the applicability of the *New York Times* doctrine by reference to the specialization of the publication or the limited readership to whom it appeals can be obtained by reference to a few of the specialized publications presently existing in the United States. According to the 36th Annual Report of the Securities and Exchange Commission, there are presently 3,060 investment advisers and 5,224 broker-dealers registered with the Commission. Many hundreds of these issue publications which report on the financial condition of particular companies, the market performance of those companies' securities and significant events which may affect the investment value of securities issued by the companies who are the subjects of the reports. The possibility of error is always present; the adverse consequences of restriction of the service to the public are obvious.

Professional and trade journals lend another dimension to the problem. According to American Business Press, Inc., there were 1,150 industry publications being issued in this country as of January 1970. In addition, there were 488 merchandising publications, 340 medical publications and 110 educational

publications. Most of these are circulated only to subscribers. All of these discuss topics of interest only to a limited readership. A medical journal circulated to doctor-subscribers, for example, which discusses the merits of a drug or comments upon the practices or condition of a drug manufacturer can do more public good and, correspondingly more harm to the manufacturer of the drug than a newspaper which publishes an article on the same topic. It can hardly be argued that articles published by the medical journal are not of general interest to the public and the medical community. If the free flow of information which is of public concern is the objective which the First Amendment seeks to achieve, any information of interest to a significant section of the public, circulated to persons who have a special interest or function with respect thereto, must be considered to be of public interest. Almost no topic will be of interest to everybody.

Application of state common law to situations like the case at bar has encouraged numerous libel actions against companies reporting financial information for use in making commercial decisions. As in the case at bar, the jury awards are often disproportionately large even when the injury is nonexistent or slight. The actions are often occasioned by inadvertent errors which result in publication of information obtained by standardized techniques which are almost always reliable and which rarely result in error. Such actions can only serve to induce curtailment of the service to relatively few companies at greatly increased cost to subscribers, and to inhibit the free flow of information which the First Amendment is designed to facilitate.

III.

This case calls upon this Court to decide what types of damage awards are consistent with the mandate of the First Amendment.

In the aftermath of *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 91 S.Ct. 1811 (1971), doubts exist as to the evidence and causality of injury that must be shown in a state libel action, to comply with First Amendment requirements. The basic issue is whether, if we are to provide appropriate play for the policy of the First Amendment, state libel actions can be sustained at all in the absence of proof of actual, specific damage. In a concurring opinion in that case, Mr. Justice White, analyzing his brethren's opinions, expressed the view that at least five members of the Court, as then constituted, would adhere to a rule that "[i]n all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited."

The second issue is whether, or in what circumstances, awards of punitive damages are consistent with the mandate of the First Amendment. In a dissenting opinion in *Rosenbloom,* by Mr. Justice Marshall, in which Mr. Justice Stewart concurred, the view was expressed "that the appropriate resolution of the clash of societal values here is to restrict damages to actual losses." That opinion went on to state: "Of course, damages can be awarded for more than direct pecuniary loss but must be related to some proven harm." In a separate dissenting opinion, Justice Harlan wrote that states should not be "wholly disabled from exacting compensation for . . . measur-

able adverse consequences" of libelous publications, but that "punitive damages that bear no discernible relationships to the actual harm caused by the publication at issue" should not be allowed.

The case at bar dramatically demonstrates the wisdom, prudence and necessity of protecting publications against the chilling effect of law suits in which there is no proof of specific harm or actual or special damages. The plaintiffs did not attempt to establish special damages and the jury found that none had been suffered. There was not a shred of evidence of lost credit relations or lost business. Because of the corrective measures immediately taken by the defendant, it is difficult if not impossible to believe that there could have been damage. Nevertheless, the jury awarded $100,000 general damages and $50,000 punitive damages. These awards were made possible and were sustained on the principle that damage is to be presumed from the bare fact of an erroneous statement relating to the credit standing of a business. This is a judicial declaration of the doctrine of libel per se, without proof of specific damages. As various members of this Court have stated, this doctrine should have no application to publications of information, in light of the First Amendment.

CONCLUSION

Because the decision of the Court of Appeals raises serious questions as to the applicability of the First Amendment to a broad range of important publications presently existing in the United States, and because the resolution of those questions is important to the uninhibited flow of data necessary to the proper functioning of the business community:

We respectfully submit that the Court should grant petitioner's prayer for a Writ of Certiorari.

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December 20, 1971

APPENDIX

APPENDIX A

RULINGS OF THE LOWER COURTS

Excerpts from Pre trial Rulings of Court

Counsel must surely recognize the difficulty encountered by the Court in passing upon issues submitted for the reason that until evidence is presented, the Court cannot, with certainty, forecast the weight which may be given to it or the inferences which may be fairly drawn from such facts by the jury.

The Court has discovered that this is not a run-of-the-mill libel case and that the application of rules of libel to public officials, public figures and other conditions where privilege may be inferred as a matter of law, is not applied in the same manner. We are here dealing with a situation arising in the area of commercial business transactions where the damage to the credit standing of a business enterprise, a matter in which the public has little interest or direct concern, becomes the gist of the action.

The Court has discovered that in cases of this kind the application of the rules relating to the establishment of privilege is not identical with its existence in other areas, but appears to hold the defendant to a greater degree of responsibility than is generally required in other cases.

If the Court has failed to consider all the items presented for its consideration, such failure is due to oversight and should be promptly called to the Court's attention.

Dated at Topeka, Kansas, this 10th day of September, 1968.

/s/ GEORGE TEMPLAR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Order Denying Defendant's Motion To Set Aside Verdict of the Jury and Judgment Thereon, and for Judgment Notwithstanding Such Verdict, or, in the Alternative, for a New Trial

This action for libel was commenced March 29, 1965. After a great deal of legal maneuvering, the case finally was set for jury trial which commenced May 19, 1969, and concluded on May 26, 1969, when the jury returned a verdict in favor of the plaintiff for general damages in the amount of $100,000.00, and punitive damages in the amount of $50,000.00.

Defendant has filed a motion attacking the verdict on some twenty-four separate grounds. Most of the grounds alleged disclose that defendant complained of the admission of practically all evidence offered and received in evidence.

During the proceedings prior to trial, the Court undertook to analyze in detail the various legal propositions involved and to resolve, to the extent possible, the issues of law and fact necessary to be submitted in the trial which followed. It would serve no useful purpose to reiterate all that was said by the Court in the rulings and orders heretofore prepared and filed in the case.

On September 11, 1968, the Court prepared and filed "Pre-Trial Rulings of the Court." (Doc. 74.) In this the Court summarized the pleadings of the parties and at the invitation of defendant, announced rulings on several legal questions presented by the issues raised in the record of the case. Those rulings need not be repeated here but the Court believes them to be correct.

Defendant complained of the Court's pre-trial rulings and sought to have them reconsidered. They were reconsidered at length and on November 13, 1968 (Doc. 75), the

Court entered its order on reconsideration, pointing out that defendant was seeking to obtain partial summary judgment rulings on material factual matters which were uncertain. The Court did consider and rule upon the question of which party was to be imposed the burden of proof on certain issues likely to be presented at trial. (Page 5 of the order).

Thereafter, the Court prepared a pre-trial order (Doc. 98) in which was set forth the Court's rulings on a number of matters requiring determination. One of the principal rulings involved the question of whether plaintiff could recover damages which may have been suffered by three subsidiary corporations, not owned by plaintiff, but the stock of which was owned by the same group of stockholders of plaintiff corporation. The Court sustained defendant's objection to this and ruled that if these other corporations were proper claimants at all, they should have been joined as parties plaintiff. At the trial, the Court permitted plaintiff to show the volume of its business which necessarily included its sales to these related corporations. The Court specifically advised the jury during the trial, and in Instruction No. 14 admonished the jury as to the limited purpose for which this evidence was received. The plaintiff was entitled to show the extent and nature of its business to which defendant had wrongfully attributed bankruptcy. Defendant has complained about admission of all evidence received at trial which plaintiff was entitled to show as bearing upon the questions of damages. Defendant claims that this evidence came as a surprise and is without merit. The discovery of defendant had produced for it the complete financial operations and dealings of all four corporations. If plaintiff had been prevented from showing the nature and extent of its business dealings, defendant would then charge that plaintiff had no business which could suffer damages.

Defendant argues that there was no malice shown. The Court feels that the Kansas law it recited in its earlier

rulings required the submission of the question of malice. The Court had ruled that any libelous notice sent to a subscriber of defendant was "conditionally privileged" and instructed the jury that unless they found from the evidence that the notice was actuated by malice on the part of the defendant, plaintiff could not recover. (Instruction No. 9). Defendant claims the Court submitted the case on the theory of negligence rather than malice. The Court specifically told the jury that defendant's liability did not arise from negligence, but that they could consider whether the erroneous report was a result of a negligent investigation of the court records in determining whether defendant acted in a willful, wanton and reckless disregard of the rights and interests of the plaintiff. This, the Court believes was proper. *Restatement, Law of Torts*, § 505(1) g. Cf. *Goldwater* v. *Ginzburg*, 414 F.2d 324, 343, where the Court of Appeals for the Second Circuit discussed the admissibility of evidence which might indicate negligence in support of a claim that malice existed on the part of a defendant in a libel action. There it was said:

> "This evidence, appellants argue, was irrelevant for at most it would only tend to show that appellants were negligent pollsters. Consequently, the argument continues, its admission was prejudicial error. We disagree. As already stated, *supra*, *Times* does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there

is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court."

The complete reckless disregard for plaintiff's rights and the apparent utter indifference manifested by conduct of defendant's employees and agents in collecting and circulating the libelous notice certainly made the issue of malice submissive under the Kansas law heretofore discussed in the Court's rulings before trial.

Defendant has urged the Court to follow the rulings set out in the case of *Altoona Clay Products* v. *Dun & Bradstreet, Inc.*, 286 F.Supp. 899, contending it is a case on all fours with the one at bar. This Court has read that case carefully. It would be fair to observe that the case was first disposed of by the trial court on a motion for a directed verdict at the close of plaintiff's evidence. On appeal, this order of the trial court was reversed and remanded for a trial which was held resulting in a general damage verdict of $110,000.00. The same trial judge overruled a motion for directed verdict presented by defendant but did sustain a motion for a new trial, fortifying this ruling with a 15-page opinion. Subsequent developments in this case have not been disclosed and the citator, just examined, does not show any later consideration of the case. The *Altoona* case is not a parallel case in several respects.

There, the Court instructed the jury that the jury must decide whether the communication was understood by its recipients to imply insolvency of the plaintiff (at 906-907). Here, the communication was clearly libelous and no innuendo or question of understanding need be considered. There, the Court determined there was no evidence showing any damage proximately caused by the libelous communication (at 908). Here, there was substantial evidence of damage caused by the libel which anyone could understand was injurious to plaintiff. There, the law of libel

is apparently defined by the statutes of Pennsylvania (at 905). Here, the common law of Kansas controls. There, the action was brought by an assignee for the benefit of creditors. A receiver had later been appointed who was made a real party in interest (at 904). Here, plaintiff was and is and has been at all times a going concern. There, the Court considered that plaintiff had been guilty of negligence which contributed to confusion of names of two companies which were so similar that the libel arose as a result. Here, there can be no such negligence charged to plaintiff. Many other differences exist between the two cases but the foregoing will suffice to show the cases have little in common other than Dun & Bradstreet was the defendant in each instance. The conclusion reached by the Court in *Altoona* (at 914) clearly demonstrates the difference in the two cases.

An examination of the opinion rendered by the Third Circuit in the *Altoona Clay Products* v. *Dun & Bradstreet* case and reported in 367 F.2d 625, is instructive. There, the Court held that a publication imputing insolvency, financial embarrassment, unworthiness of credit, or failure in business of plaintiff is libelous; that the determination of whether a credit report on its face imputed insolvency is for the Court; that want of care and diligence on the part of a credit publication to ascertain the truth, before giving currency to an untrue communication, will destroy the privilege and that the amount of damages sustained by a plaintiff as a result of a false credit report issued by the defendant is a jury question. This undoubtedly is the controlling law in the Third Circuit.

Defendant asserts that the verdict of the jury demonstrates passion and prejudice on the part of the jury. This Court could observe no indication of passion and prejudice. The verdict was large. It could have been much larger. The facts disclosed revealed a reckless disregard on the part of the defendant as to whether the state-

ments in its communication were true. *Richardson* v. *Gunby*, 88 Kan. 47.

The issue of compensatory damages was submitted to the jury consistent with Kansas law first announced in *Miles* v. *Harrington*, 8 Kan. 284, where the Court pointed out that when special damages are not alleged, a jury may still give a verdict for such general damages as the plaintiff may sustain, and all damages which are the necessary and natural result of the words spoken (published) are general damages. That case also held that under the circumstances the law permits exemplary damages and whether they should be allowed is a question for the jury. Kansas law is substantially that found in *Restatement, Law of Torts*, Chap. 27, §§ 621 and 622.

The *Miles* decision has been followed by the Kansas Court in the following cases: *Walker* v. *Wickens*, 49 Kan. 42, 30 Pac. 181; *Hanson* v. *Krehbiel*, 68 Kan. 670, 75 Pac. 1041; *Roniger* v. *McIntosh*, 91 Kan. 368, 137 Pac. 792; *Bothe* v. *True*, 103 Kan. 562, 175 Pac. 395.

Instructions given the jury in this case followed substantially the law of damages in libel cases as declared by the Kansas Supreme Court. At the time the case was tried and the instructions given, this Court had before it the opinion in *Patterson Dental Company* v. *Wadley*, 401 F.2d 167 (10 Cir.), and very carefully undertook to define the difference between "general damages" and "special damages." Since the libel here was determined to be "per se," the basis for a distinction is not so important. See *Restatement, Law of Torts*, § 622.

This distinction seems to be recognized in *Wegner* v. *Rodeo Cowboys Assoc.*, 417 F.2d 881 (10 Cir.), where it was held that under Colorado law a libel per quod case may be submitted to the jury without showing special damages when imputation affects plaintiff's trade, profession or office.

The Court submitted to the jury special interrogatories and in response the jury answered that they included no

special damages in their award for compensatory damages to plaintiff but that they included the sum of $100,000.00 in their compensatory damage award, being the amount they found from the evidence would fairly and reasonably compensate plaintiff for its general damages.

Defendant complains that the jury, having found no special damages, the verdict for general damages should have been only nominal. Such reasoning does not necessarily follow. Consistent with Kansas law, which this Court believes it is bound to follow, where general damages are alleged and compensatory damages are allowed by the jury, it is for the jury to determine the amount of damages sustained by plaintiff. See *Bothe* v. *True*, supra. Special note should be taken of the instruction on compensatory damages approved by the Kansas Court in the *Bothe case*. Also see *Roniger* v. *McIntosh*, supra. Thus, under Kansas law, the Court believes the amount of compensatory damages must be left for the jury's determination under proper instructions which were given in this case. This rule was recognized in the recent case of *Manville* v. *Borg-Warner Corp.*, 418 F.2d 434, 437 (10 Cir.).

Furthermore, under the rule announced in *Kinsella* v. *Leonard*, 415 F.2d 574 (10 Cir.), trial courts, especially federal courts, should be extremely reluctant to reverse judgments based on jury verdicts fixing the amount of damages.

The Court has reviewed its extensive trial notes and must find that no basis exists to support defendant's contention that the verdict was a result of passion and prejudice on the part of the jury. Nothing appears in the record to support this contention.

The Court has reviewed the rulings on evidentiary matters. None were prejudicially erroneous.

Nor can the Court find that defendant was misled by any change in theory of plaintiff's case. The Court sus-

tained the defendant's contention that the three subsidiary or related corporations were not entitled to join in the claim of the parent company and so instructed the jury. This is what the pre-trial order provided. Any change in theory of plaintiff's case was brought about by reason of defendant's objections which the Court sustained.

Defendant complains that the closing argument of plaintiff's counsel was so prejudicial that it is entitled to a new trial. The Court has not been supplied with a transcript of the arguments of counsel but has reviewed its notes and refreshed its recollection of the trial. The Court can find nothing that approaches prejudicial conduct in this regard on the part of counsel. Plaintiff's counsel effectively presented their case and quite properly argued the facts and the reasonable inferences that could be drawn from them. There were no calculated appeals to passion or prejudice. The jury saw fit to believe the evidence offered by plaintiff and obviously considered the conduct of defendant to be without excuse. That the jury found defendant's acts to be prompted by malice is clearly supported by evidence which the jury saw fit to believe. Defendant could not and did not undertake to refute the conduct and acts of its employees. It only hoped the jury might believe its contention that plaintiff suffered no damage. The jury saw fit not to accept this contention of defendant. This was the jury's province.

The defendant was afforded a fair trial. The issues were properly submitted. The Court must approve the findings of the jury.

The motion of defendant must be overruled and denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 16th day of February, 1970.

/s/ GEORGE TEMPLAR
United States District Judge

Panel: CLARK, Associate Justice,
United States Supreme Court,
sitting by designation;
HILL and McWILLIAMS, Circuit Judges.
Opinion written by McWilliams,
Circuit Judge.

TENTH CIRCUIT

No. 315-70

This is a libel case which bears considerable resemblance to Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1971), to which there will be subsequent reference. Kansas Electric Supply Company, Inc., a wholesale electric supply company hereinafter referred to as the plaintiff, brought an action for libel per se against Dun & Bradstreet, hereinafter referred to as D & B, for compensatory and punitive damages resulting from a false subscriber's report circulated by D & B to the effect that plaintiff was in bankruptcy. Upon trial the jury returned a verdict in favor of the plaintiff and fixed compensatory damages at $100,000 and assessed punitive damages in the sum of $50,000. Judgments in accord with the jury's verdicts were thereafter duly entered and D & B now appeals.

On April 14, 1964, the plaintiff, along with two other creditors of the Dowling Electric Company, filed a petition in involuntary bankruptcy against Dowling in the United States District Court in Topeka, Kansas. On the afternoon of the same day an employee of D & B in checking court records came across the aforesaid petition. However, the employee misread the petition and understood it to be a petition filed by Dowling to put plaintiff in bankruptcy. The employee reported her erroneous findings in this regard to her supervisor and as a result thereof a pink-colored *Special Notice* was mailed the same day to proper subscribers of D & B stating that a petition in involuntary bankruptcy had been filed against the plaintiff. These are the basic facts out of which the present controversy emerges and further reference to the evidence will only be made where such relates to the various grounds here advanced by D & B as to why the judgment should be reversed.

Perhaps the major issue to be resolved is the applicability, if any, of the rule of New York Times Co. v. Sullivan,

376 U.S. 254 (1964), and its progeny, to the instant case. D & B argues that *New York Times* does apply and that the trial court should have directed a verdict in its favor because of a total lack of proof of "actual malice" as required by and as defined in *New York Times*. Plaintiff, on the other hand, contends that the rule of *New York Times* does not apply to the instant case and that the case was properly tried under Kansas libel law.

This precise argument was explored in depth in Grove v. Dun & Bradstreet, Inc., *supra*. In that case a libel action against D & B was based on an erroneous subscriber's report that a confession judgment in the penal sum of $60,000 had been entered against the plaintiff, a Pennsylvania corporation engaged in the brokerage of bricks and tile. In holding that the trial court erred in setting aside a verdict in favor of the plaintiff in the amount of $110,000 and entering judgment notwithstanding the verdict for D & B, the Third Circuit speaking through Judge Aldisert held that the doctrine of *New York Times* did not extend to private subscription credit reports and that alleged defamations resulting from such reports are properly subject to state libel law. In so holding that court declared: (1) The business or credit standing of the brick company was not a matter of "real public interest"; and (2) a publication of the type there under consideration which provides specialized information to a selective, finite audience is not a medium entitled to the extended constitutional protection provided by *New York Times* and its successor cases. In this particular connection we fully approve of the rationale of Grove v. Dun & Bradstreet, Inc., *supra*, and accordingly hold that the trial court did not err in its determination that the rule of *New York Times* does not govern the instant controversy.

Having determined that the *New York Times* doctrine does not apply, the next matter to be determined is whether the case was properly tried under Kansas libel law. Our

examination of the record convinces us that it was. The jury was instructed that the credit reports of D & B were "conditionally privileged" and that the mere fact that the credit report under consideration was erroneous was not sufficient to justify the returning of a verdict for the plaintiff. Rather, according to the instructions, the plaintiff could not recover unless it established by a preponderance of the evidence that the erroneous report was issued with malice. The instructions then went on to define "malice" in accord with the Kansas law.[1] As concerns the

[1] Instruction No. 9 reads as follows:

"You are instructed that you may find defendant was actuated by malice if, in issuing the special notice, defendant acted not in good faith but in bad faith toward plaintiff, and with an intent to injure plaintiff in its business, or in willful, wanton and reckless disregard of the rights and interests of plaintiff. If you find that the special notice was disseminated by defendant with malice, as that term is above defined, then the 'conditional privilege' is abused and not applicable, and you must find for plaintiff. The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that defendant was actuated by malice, as heretofore explained. While this is not a case in which liability of the defendant arises from proof of defendant's negligence, you may consider, among other facts in the evidence, whether the erroneous report given by defendant to its subscribers was a result of negligent investigation of the records of this Court in determining whether defendant acted in willful, wanton, and reckless disregard of the rights and interests of plaintiff."

Instruction No. 10 reads as follows:

"You are instructed that a willful, wanton, and reckless act is one indicating an intentional, reckless disregard and complete indifference and unconcern for the probable consequences of the act. Recklessness is an indifference to the rights of others and an indifference of whether wrong or injury is done.

"It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of this act was injury to the plaintiff."

instructions thus given, we find no such error as would entitle D & B to a new trial.

D & B further urges in this same general connection that even under the Kansas law on libel the case should not have gone to the jury because there was no proof that D & B acted with a wilful, wanton, and reckless disregard of plaintiff's interest. In other words, according to D & B, this is a case of an "honest mistake," and hence under either *New York Times* or Kansas libel law the trial court should have directed a verdict in its favor. We disagree. Our study of the record leads us to conclude that there was sufficient evidence to carry the case to the jury on the issue as to whether under all of the circumstances D & B acted in a wilful, wanton and reckless manner as concerns the plaintiff, which incidentally had itself been a long time subscriber of D & B and which in the days immediately preceding the publication of the erroneous report had itself made repeated inquiry of D & B regarding the credit standings of Dowling. Additionally, in this same general regard plaintiff's net worth estimate had been placed at $300,000 to $500,000 and circulated as such by D & B over a substantial period of time prior to the report here in question. All things considered, the trial court did not err in refusing to direct a verdict for D & B.

As a part of its case, plaintiff called as its witness one A. E. Frickey, a Topeka businessman. The gist of his testimony was that on or about April 16, 1964 (two days after D & B disseminated its erroneous subscriber's report on plaintiff), he received a telephonic call from a woman who identified herself as representing D & B; that the caller attempted to solicit his subscription to D & B and in the course of her sales talk inquired as to Frickey's various suppliers; and that when he mentioned plaintiff, she "wanted to know if I knew they were in bankruptcy." Frickey testified that prior to the telephone call here in question, he had received other calls of a similar nature

from one claiming to represent D & B and that D & B had in fact been "soliciting in that way for several years."

D & B objected to the admission of this testimony on the ground that there was insufficient foundation for its admission into evidence. The trial court overruled this objection and admitted the testimony in question. Additionally, by instruction the trial court advised the jury that such testimony was only to be considered in connection with the issue as to whether D & B had acted with malice towards the plaintiff. We find no error in the trial court's handling of this matter.

Concerning the necessity for authentication, C. McCormick, Law of Evidence 405-06 (1954), declares as follows:

> "If a witness testifies that he received a telephone call 'out of the blue,' and that the voice at the other end declared 'This is X calling,' followed by a message from the purported X, this is not a sufficient authentication of the message as coming from X. The needed link, however, will be supplied if the witness testifies that he recognized X's voice, or if the message reveals that the speaker had knowledge of facts that only X would be likely to know, or if other confirming circumstances make it probable that X was the speaker."

Opposing counsel agree on the general rule but disagree as concerns its application to the facts of the instant case. Both cite and rely on State v. Freeman, 408 P.2d 612 (Kan. 1965), where it was held that testimony identifying the defendant in a criminal proceeding which is based, in part, upon recognition of the accused's voice is admissible. A case perhaps more in point is State v. Kladis, 238 P.2d 522 (Kan. 1951), where the Kansas Supreme Court subscribed to the general rule that in order for a telephone conversation to be admissible in evidence the identity of the party on the other end of the line must be satis-

factorily established by either direct or circumstantial evidence and in so holding that court observed that "[t]he calls themselves are not to be isolated from the other circumstances." Other illustrative cases bearing on this particular point are N.L.R.B. v. Carpet, L. & R. T. Layers, 213 F.2d 49 (10th Cir. 1954); Gutowsky v. Halliburton Oil Well Cementing Co., 287 P.2d 204 (Okla. 1955); and Texas Candy & Nut Co. v. Horton, 235 S.W.2d 518 (Tex. 1950).

In the instant case the issue is not so much the identity, as such, of the caller but rather the authenticity of her claim to be representing D & B. However, resolution of the matter is still governed by the general rules above referred to. Proceeding to an analysis of the facts and circumstances surrounding the telephone call here under consideration, according to the witness Frickey this was not the first call he had received from one ostensibly representing D & B; rather he had received similar solicitation calls from D & B over a period of several years. The fact that there was this pattern of conduct rather than a single isolated call looks towards authenticity. Additionally, the nature of the conversation tended to identify and authenticate the call. In short, the facts and circumstances considered, the trial court did not err in admitting Frickey's testimony nor in its handling of the matter in its instructions to the jury. To have excluded this evidence would indeed have been "isolating" it from all the other circumstances of the case.

Finally, it is argued that the compensatory and punitive damages awarded by the jury are excessive, especially in light of the fact that the jury by special interrogatory found that plaintiff had suffered no special damages. All agree that the amount of damages is generally left to the discretion of the jury, unless, says D & B, the jury award be "shocking to the conscience of the court and obviously the result of passion or prejudice on the part of the jury." Lewis v. Montgomery Ward & Co., 62 P.2d 875 (Kan. 1935). The trial judge was obviously not in anywise

"shocked" by the size of the verdicts, nor are we. As evidence of the former, the trial court in denying D & B's post-trial motions commented as follows:

> "Defendant asserts that the verdict of the jury demonstrates passion and prejudice on the part of the jury. This Court could observe no indication of passion and prejudice. The verdict was large. It could have been much larger. The facts disclosed revealed a reckless disregard on the part of the defendant as to whether the statements in its communication were true. * * *"

Our review of the record convinces us that the trial judge was correct in his appraisal of this matter. There was evidence that during the years immediately following the circulation by D & B of the false report the wholesale electric supply business in general experienced a steady growth, whereas for the same years plaintiff's volume of business experienced a steep decline. And the state of the record is such that the jury could justifiably conclude that the cause of this decline was the action of D & B. As concerns instructions, the jury was instructed in accord with Kansas law that compensatory damages may be either general or special in nature and that general damages are those damages which actually and necessarily flow as a natural result of the wrongful act and included, among other things, such injuries as "impairment of reputation and public humiliation." *See* in this regard M. F. Patterson Dental Supply Company v. Wadley, 401 F.2d 167 (10th Cir. 1968).

Grove v. Dun & Bradstreet, *supra*, again has applicability on the damage phase of the present controversy. There, as here, the jury found no so-called special damage, and the trial court attached considerable significance to that fact in granting D & B's motion for new trial. Grove v. Dun & Bradstreet, Inc., 286 F. Supp. 899 (1968). On appeal this action of the trial court was reversed with the observation that in a libel per se case a jury's award of

general damage is not to be reversed because it may exceed the specific damages reflecting a decrease in trade or loss of profit. In Kinsella v. Leonard, 415 F.2d 574 (10th Cir. 1969), we observed that federal trial courts are extremely reluctant, and rightly so we add, to set aside jury verdicts fixing the amount of damages. Using the same yardstick, we too are extremely reluctant to set aside a jury's verdict fixing the amount of damages in an action of this type and we decline to do so.

Judgment affirmed.

APPENDIX B

Relevant Jury Instructions

INSTRUCTION NO. 18

You are instructed that damages recoverable in actions for libel are of two kinds, compensatory and punitive. Compensatory damages are referred to as general and special damages. General damages are all damages which actually and necessarily flow from the wrongful act and those which the law presumes to be the natural, proximate, and necessary result of a libelous publication maliciously disseminated. General damages are designed to compensate the injured party for such injuries as impairment of reputation and public humiliation. Such damages arise by inference of law and are not required to be proved by a showing of specific harm since the law presumes such damages to necessarily flow from a malicious dissemination of libelous information. Any such damages given must be reasonable under the circumstances with due regard to the evidence presented during the trial. Special damages, on the other hand, are compensatory damages which naturally, but not necessarily, flow from the wrongful act, such as loss of customers, loss of profits, diminution of trade, and such future business losses as can be shown with reasonable certainty.

In this regard, you are instructed that before one may recover damages for loss of profits it must be shown that the business had been in successful operation for such period of time as to give it permanency and recognition, and that it was earning profits that can be ascertained or approximated with reasonable certainty.

Special damages are not presumed to be a necessary or inevitable result of a libelous dissemination. The plaintiff has the burden of proving the special damages alleged by a preponderance of the evidence.

INSTRUCTION NO. 20

Should you first find plaintiff is entitled to compensatory damages, you may in your discretion award punitive damages for the purpose of making an example of and of punishing defendant for the wrong done. In awarding punitive damages, if any, you should remember that the amount should not be so small as to be trifling, nor so large as to be unjust, but such as candid and dispassionate minds can approve as punishment and as a warning to others against similar conduct.

In considering whether or not punitive damages should be awarded in determining in what amount, if any, such award should be, you should take into consideration all the facts and circumstances, together with the evidence of the defendant offered in mitigation, and your award, if any, of such punitive damages should be reasonable in the light of all the circumstances.

If you should award punitive damages, you are instructed that the amount cannot exceed $100,000.00, the amount prayed for by plaintiff.

INSTRUCTION NO. 21

In determining the amount of an award of general damages, if any, you may consider, together with the elements heretofore mentioned, the character of the publication in question, the area of dissemination, the extent and duration of the circulation of the publication, the public retraction by defendant to those who received the special notice, and the timeliness and adequacy of the retraction issued to the persons who had received the original erroneous notice and the fact that defendant also, at the plaintiff's request, notified a list of persons who did not receive the original erroneous notice that an error had been made.

You are instructed that the motive and purpose of defendant, its belief or knowledge of the falsity of the publication are not to be considered in determining the general or special damages to which the plaintiff may be entitled, although such factors are important on the question of whether the plaintiff is entitled to punitive damages.

APPENDIX C

Special Notice Relating to Plaintiff

Dun & Bradstreet Report

SPECIAL NOTICE

SN 65 APR 14 1964 N

KANSAS ELECTRIC SUPPLY CO. INC. WHOL. 1937 INV.
Formerly B-2

301-03-05 KANSAS AVENUE
MSGE: 444 JACKSON; BOX 297
TOPEKA KANS

BANKRUPTCY

NAME: Kansas Electric Supply Co. Inc.

DATE FILED: Apr 14 1964

LOCATION FILED: U. S. District Court, Topeka Kans

PETITION #37 12-B-1 Involuntary

ATTORNEY: Dickinson, Aiken, Crow, Skoog & Honeyman, Topeka Kans
No Schedule Filed.
Petitioning Creditors: Dowling Electric
Kris-Davis, Topeka
Peters Electric, Topeka $1,000
Petition Suggests Total Debts of $65,000
4-14 136 118)

PLEASE NOTE WHETHER NAME, BUSINESS AND STREET ADDRESS CORRESPOND WITH YOUR INQUIRY
... furnished by DUN & BRADSTREET, Inc. in STRICT CONFIDENCE as your agreed upon subscription agreement for your exclusive use and that ... the possibility of error in ... insurance, and for no other purpose. DUN & BRADSTREET, Inc. does not guarantee the correctness of the ... shall not be liable for any loss or injury caused by the neglect or other act or failure to act on the part of said company and/or its agents in procuring, collecting or communicating any information.

APPENDIX D

Recent errors and corrections appearing in the business section of the New York Times.

October 26, 1971 Page 63

A Correction

Because of a typographical error, it was reported in Saturday's editions of The New York Times that a bankruptcy assignment had been filed in New York County on Friday for Stratford Mills, Inc., and Al Rosen Knit Tex, Inc. The assignment was actually filed for Stonymill, a joint venture of Stratford Mills, 65 West 36th Street, and Al Rosen Knit Tex, 65 West 36th Street. The assignment [illegible] York Credit Men's Adjustment Bureau, 71 West 23d Street.

November 20, 1971 Page 48

Business Records

BANKRUPTCY PROCEEDINGS

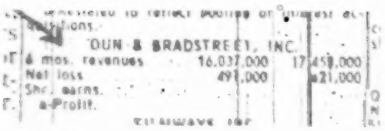
Eastern District
Tuesday, Nov. 16, 1971
Voluntary Petition

CORRECTION

BERTON MILLS, INC., 8 W. 40 St., has filed a Chapter XI petition for an arrangement in the Southern District, listing assets at $1,546,000 and liabilities at $1,570,000. The action was incorrectly listed as a Chapter X petition in the Nov. 18 editions of The New York Times.

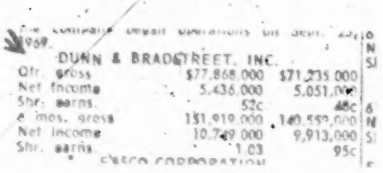
July 16, 1970 Page 51

ERROR



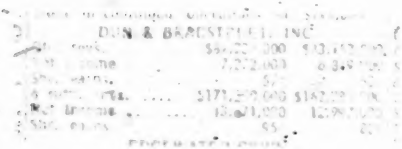
July 17, 1970 Page 45

CORRECTION



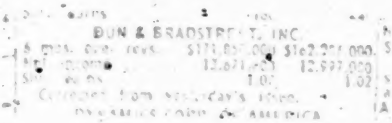
July 22, 1971

ERROR



July 23, 1970

CORRECTION



July 15, 1971 Page 44

A Correction

Merrill Lynch, Pierce, Fenner & Smith, Inc., earned an indicated $13,895,000 in the second quarter of 1971. This figure was incorrectly reported in yesterday's late editions of The New York Times as $18,895,000.

April 1, 1971 Page 64

A Correction

The Chase Manhattan Corporation expects that its first-quarter earnings before profits or losses on security transactions will be up 35 per cent to 40 per cent from the $28.4-million, or 89 cents a share that it reported for the same period last year. A report in yesterday's editions of The New York Times incorrectly used Chase's net income for the first quarter last year—which was $6.8 million lower due to losses on sales of securities to make the comparison.

August 5, 1971 Page 51

Earnings Are Clarified

The Glen Alden Corporation stated yesterday that its six operating divisions were each profitable and that higher results were shown by its major divisions—Schenley Industries, Playtex Products and Panacon. In The New York Times yesterday, it was reported that Glen Alden would have had a deficit from operations without Schenley's earnings. Actually, Glen Alden's net income for the second quarter was $7,640,000, or 33 cents a share, including Schenley results which were announced separately.

May 15, 1971 Page 45

A Correction

The National General Corporation's net income of $4,273,000 for the first quarter this year and $2,245,003 earned in the 1970 period did not include gains on marketable securities inadvertently stated in yesterday's editions of The New York Times.

May 26, 1971 Page 55

A Correction

Because of a typographical error in the table accompanying the report on sales of The New York Times on Tuesday, it was reported that the offering price of Telectronics International was 17¼. The correct price was 7¼, and the volume [illegible] was 51,[illegible]

October 8, 1971 Page 66

A Correction

The earnings of Helena Rubinstein, Inc., in the first nine months of 1971 were $1,750,000, not including an extraordinary profit of $665,719 arising from the sale of property and a net gain in currency valuation changes. In Saturday's editions of The New York Times, the extraordinary profits were incorrectly reported as being included in the earnings figure.

June 5, 1971 Page 65

A Clarification

A story in The New York Times from Paris on May 3 reported that Cofindus, a holding company owning a 4 per cent interest in the bankrupt Continental Company of Financial Management, otherwise known as Interest, and based in Lausanne, Switzerland, was "associated" with the Bank of [illegible]. The story states that because Cofindus owns shares in the bank, it is not associated with bank

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-816

DUN AND BRADSTREET, INC., a Delaware Corporation,
Petitioner,

vs.

KANSAS ELECTRIC SUPPLY COMPANY, INC.,
a Kansas Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Topeka, Kansas 66603
Attorney for Respondent

Of Counsel:
SAM A. CROW

March 3, 1972

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-8030

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Kansas Electric Supply Company, Inc., respondent, opposes the issue of a Writ of Certiorari as requested by the petitioner herein.

OPINION BELOW

The Tenth Circuit Opinion is included in Appendix A of the Petition filed herein as is the Trial Court's Order Denying Defendant's Motion to Set Aside Verdict of the Jury and Judgment Thereon.

JURISDICTION

The basis of jurisdiction in the District Court was 28 U.S.C., Section 1332 (a) and the jurisdiction of this court is claimed under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Is a false report of bankruptcy issued in wilful, wanton and reckless disregard of the rights and interests of a business by a credit reporting agency of such "real public interest" that it is not actionable under State Libel Law?

2. Are the secret reports published "in STRICT CONFIDENCE" by a credit reporting agency entitled to the extended constitutional protection as "freedom of speech, or of the press;" provided by *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) and its progeny?

3. Is the rule set forth in *New York Times* v. *Sullivan*, a basis for immunity from liability for actual harm and general damages in regard to a mercantile credit agency publisher of false libelous statements regarding its subscriber, if the publication is published "with actual malice"?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 11 of the Bill of Rights of the Constitution of the State of Kansas:

> "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

and the First Amendment to the Constitution of the United States of America:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

This is an action for a libel per se brought by the plaintiff, Kansas Electric, an electric wholesale supply company, against Dun and Bradstreet, Inc., a mercantile credit agency, by reason of a false report published by D & B to the effect that Kansas Electric was in bankruptcy. The false report was circulated commencing April 14, 1964 and complaint was filed and action commenced on March 29, 1965. The matter was tried to a jury in May of 1969. The jury returned a verdict of $100,000 for compensatory actual damages, and $50,000 punitive damages, and a judgment was filed and entered by the Trial Judge. Thereafter D & B filed an extensive motion to set aside the verdict of the jury and judgment notwithstanding the verdict, or in the alternative, for a new trial. The motion was briefed, argued and was determined and denied by the Trial Judge on February 16, 1970. (The opinion of the Trial Court is set forth in full in Appendix A of the petition filed herein.) D & B then appealed the judgment to the United States Court of Appeals for the Tenth Circuit and the appeal was briefed, argued and determined there by the panel consisting of Clark, Associate Justice, United States Supreme Court, Hill and McWilliams, Circuit Judges, affirming the judgment of the Trial Court. This Petition for Certiorari follows.

STATEMENT OF RELEVANT FACTS

The record is clear in its recitation of the facts. Respondent is a domestic Kansas wholesale electric equipment and supply business, managed substantially by the founder and his wife, their two children and son-in-law. The company is located in Topeka and grew steadily there from 1939 until 1957, when three affiliates throughout the State of Kansas were added and growth continued. All purchases were made for all stores through Topeka and all credit was extended through Topeka. These facts and a net worth estimate of $350,000 to $500,000 by D & B were published and circulated by petitioner over a substantial period of time prior to the report here involved.

In 1958 one of respondent's customers, Dowling Electric Company, became indebted to respondent in the amount of about $30,000. From that time to the time here involved, April, 1964, respondent maintained a continuing interest in the Dowling financial condition through written reports from D & B and by informal oral reports and conversations (as often as every two months) with members of the two to three person staff of D & B located at its Topeka office.

On April 6, 1964, respondent's president contacted the manager of the Topeka office of D & B and advised him of some information about Dowling which he had received, and asked that D & B check the information and determine whether in fact Dowling was out of business and had settled with creditors other than Kansas Electric. On April 9, 1964, D & B issued a report confirming that Dowling was out of business.

On April 14, 1964, respondent, with two other creditors, who had not been paid by Dowling, filed a petition in involuntary bankruptcy against William Dowling and Ruth Dowling, d/b/a Dowling Electric Company, in the

United States District Court in Topeka. The petition alleged preferences to Richard Peters, Peters Electric, Inc., and Kriz Davis, Inc.

Roberta Adkins was secretary to the manager and clerk in the two to three person office maintained by P & B in Topeka. She was the office mainstay, being the only person who had been continually employed there since her original employment in 1959.

One of her duties was the checking of court proceedings. She denies any training by P & B management or supervisors by way of supervision, guides, manuals, seminars or other attention or supervision of the reporting work assigned to her, except that on her first day at work her predecessor had introduced her to the staff clerks of the various courts and shown her how to fill out some routine forms.

About four o'clock P.M. on April 14, 1964 Mrs. Adkins went across the street to the office of the Clerk of the United States District Court, took the petition in bankruptcy against Dowling in hand, and made notes which she immediately relayed to the Kansas City Office of P & B. Mrs. Adkins claims that at the time she took the petition in hand, the caption of the petition was not on the petition, or at least she didn't remember it being there.

She had no contact with the manager of the office for whom she was secretary but made her contact direct with Mr. Appleby in the Kansas City Office of P & B by telephone, stating that a petition had been filed against Kansas Electric by Dowling, Peters and Kriz Davis to put Kansas Electric in involuntary bankruptcy.

Mr. Appleby took the telephone message, walked directly to the desk of his subordinate, Ed Tenny, who had had his job for approximately two weeks, and told him

"This is an involuntary petition in bankruptcy against Kansas Electric Supply, and it is correct." Mr. Tenny took out the Kansas Electric file, looked at the last report on respondent, indicating a net worth of $350,000 to $500,000, such net worth being represented by cash, inventory and accounts receivable, and, pursuant to the direction of his superior, prepared and saw to the immediate distribution of a *pink special notice*, to all subscribers listed as having a "continuing interest", some thirty-five or thirty-six companies throughout the United States.

The notice was entitled *Bankruptcy* and reported that a petition in involuntary bankruptcy had been filed against Kansas Electric Supply Company, Inc. and that its credit rating is "under investigation, formerly B+2".

The whirlwind was loose. On the next morning banks, the Small Business Administration, a city manager, the Office of the Attorney General of Kansas, suppliers, competitors, and customers throughout at least five states were telephoning back and forth to each other and D & B regarding the report. Competing salesmen in the industry called suppliers and others long before their companies received the orginal report. After being notified of the disaster by an officer of Kansas Electric, D & B checked with the attorneys for respondent and learned the true facts. Some arrangements for a written retraction were made and some additional suppliers were notified of the mistake at the request of Kansas Electric. Arrangements were tentatively made to issue a written retraction to the Kansas Electric trade, but D & B failed to follow up. Some of the written retractions reported that the net worth of Kansas Electric was $200,000 less than the true worth. A new report on Kansas Electric dated April 17, 1964 was published and circulated. The new report suggested as "pending" the $100,000 S.B.A. loan which the preparer, Mr. Tenny, knew to have been granted and the

report failed to report other current information. It also failed to note that the *false special notice* which was on that day arriving in some offices around the country, was indeed false. D & B's agent in charge of preparing and distributing the notice testified, "We find that in these reports that we can never count on anything being read as it is written."

D & B knew, or should have known, that the libel would be widely circulated and that D & B is responsible for circulation to third persons. D & B claimed protection by its written statement and contracts that the "report is furnished . . . IN STRICT CONFIDENCE". . . D & B *took no action* and *produced no evidence* that they had ever, at any time, *made any effort* to enforce or make meaningful their contract provisions with regard to maintaining the confidentiality of their reports. They knew of five subscribers who had received the false reports in this instance and had disclosed it to others, and all five such violating subscribers were still subscribers at the time of trial and no sanction against them had been made. In fact, *Kansas Electric would never have known of the false report if the contract caveat had been honored.*

The business of Kansas Electric had maintained steady growth for twenty-five years. The industry continued steady growth through the time of trial. As soon as existing orders were shipped after the libel by D & B in April, 1964, the business volume of respondent commenced a steep decline, which was apparently flattening out at the time of trial in the spring of 1969. Credit was restricted, suppliers lost, and business evaporated. No cause for the losses was suggested by reason of any change in the business management or operation other than the libel. The damage is actual harm and a direct consequence of the false report by D & B. The undisputed evidence was that

at least, conservatively, $109,000 in general loss of profit had been sustained by Kansas Electric between April, 1964 and January, 1969.

Kansas Electric prayed for $100,000 compensatory damages and $100,000 punitive damages. The court instructed, following Kansas libel law, that D & B had a conditional privilege that could only be overcome by "actual malice". The trial jury found for respondent in the sum of $100,000 general damages and $50,000 punitive damages. The Trial Court found, and the Appellate Court agreed: "The verdict was large. It could have been much larger. The facts reveal a reckless disregard on the part of the defendant as to whether the statements in its communications were true."

ARGUMENT

This cause should not be reviewed by this court. There is no conflict of decisions, the Third Circuit Court of Appeals in *Grove* v. *Dun and Bradstreet, Inc.*, 434 F. 2d 433, ... U.S. ....., ... S. Ct. ..... (1971) (71-206), cert. denied, and the Tenth Circuit Court of Appeals in this case being in complete agreement. There is no generally important question to the American public to be determined herein. The facts of this case are sufficiently unique that review by this court, as requested, would affect few, other than the litigants here, and the facts here would not provide an issue before this court which would determine the controversy between the parties.

Reasons for Not Granting the Writ

I

This case is limited to the question of the right of a credit reporting agency to issue a false report of bankruptcy in wilful, wanton and reckless disregard of the rights and interest of the respondent.

This court denied certiorari in *Grove* v. *Dun and Bradstreet, Inc.*, 438 F. 2d 433 (C. A. 3), ... U.S. ....., ... S. Ct. ..... (1971) (71-206), the case with some similarity to the case in this matter. The *Grove* case was a libel per se case under Pennsylvania law growing out of a report by the same petitioner here, Dun and Bradstreet, of a notation that a confession of judgment in the penal sum of $60,000 had been entered against a small brick and tile brokerage company. The Third Circuit in that case found that there was clearly no test under the facts there requiring "actual malice" which could be satisfied by the operative facts there. In the instant case under Kansas law the burden of actual malice was necessary to overcome the conditional privilege which Kansas law extends to mercantile credit reporting agencies. In the *Grove* case the Third Circuit stated:

> "Noting in *Butts, supra*, 388 U.S. at 152, 87 S. Ct. at 1990, 'the basic theory of libel has not changed,' and crystallizing the competing concerns of the First Amendment and 'society's "pervasive and strong interest in preventing and redressing attacks on reputation," *Rosenblatt* v. *Baer, supra*, 385 U.S. at 86, 86 S. Ct. 669,' Justice Harlan cautioned, however, that to take the rule found appropriate in *New York Times* to resolve the 'tension' between the particular constitutional interest there involved and the interests of personal reputation and press responsibility * * * as being applicable throughout the realm of the broader

constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc.* v. *Hill, supra* (385 U.S.) at 390 (87 S. Ct. 534), we counseled against 'blind application of *New York Times* v. *Sullivan*' and considered 'the factors which arise in the particular context.' Here we must undertake a parallel evaluation. 388 U.S. at 148, 87 S. Ct. at 1987."

and at 388 U.S., p. 152 this court continued

". . . Neither the interests of the publisher nor those of society necessarily preclude a damage award based upon improper conduct which creates a false publication."

D & B asserts that the Court of Appeals below held that an involuntary petition in bankruptcy filed in a United States District Court against this respondent was held not a matter of "real public interest".

There, of course, was no petition for involuntary bankruptcy filed against this company and thus the nonexistent petition could not be a matter of real public interest. The court below actually held that the business or credit standing of the respondent, Kansas Electric Supply Company, is not a matter of real public interest entitling D & B to the extended constitutional protection claimed. In so holding the Tenth Circuit relied upon *Grove*, supra (certiorari denied by this court), where the Third Circuit held at 438 F. 2d 436:

"We cannot accept the theory that plaintiff's business or credit standing is a matter of 'real public interest'. It may generally be true that 'the modern business corporation by virtue of its pervasive influence on the political, economic, and social aspects

> of American life, has necessarily become a subject of public concern to the extent that the critics of its operations and behavior must enjoy constitutional protection for erroneous statements made without actual malice.' But those cases which have required that corporate plaintiffs meet the more difficult constitutional quantum of proof have all involved corporations engaged in activities of real public interest, and are grounded in that distinction. We are not here dealing with a publication or broadcast alleging, for example, that plaintiff caused substandard building material to be used in these projects. Such operative facts might constitute a matter of grave public interest. Our research discloses no case, however, which would support the application of the more rigorous standard to the covert reportage of the credit standing of a small brick and tile brokerage firm, and we decline to do so now."

This case does deal with an area of recent public outrage in that the grave injustices to the public by credit reporting agencies, generally, have been the source of secret and confidential reports, correct and incorrect, to which the Congress has addressed itself in recent years by passage of the Consumer Credit Protection Act, 15 U.S.C. 1601 et seq. and 15 U.S.C. 1681. These Acts may not directly affect this transaction but indicate the need for individual citizens and entities within this society to be protected from false or inaccurate secret reports, and particularly those defaming and injuring citizens.

As the facts here relate this case does not deal with either an innocent publication or free flow of information. As a secret report claimed to be kept even from the person reported on by contract with all subscribers, it does not fall into the area of a medium entitled to extended constitutional protection.

The standard by which the acts of petitioner were gauged are those of Kansas libel law established in *Coleman* v. *MacLennon*, 78 Kan. 711, 98 Pac. 281, which rule of "actual malice" was adopted *by this court* in the *New York Times* v. *Sullivan* case at 376 U.S., p. 280. Publications like the New York Times, Time Magazine, The Ocala Star-Banner Newspaper, Metromedia, Inc. do not disseminate business or credit reports in secrecy under claim of special ability and knowledge to evaluate and investigate the business and financial reputation of other parties.

The Constitution of the State of Kansas in its Bill of Rights protects the liberty of the press and all persons to speak, write or publish their sentiments on all subjects subject to them "being responsible for the abuse of such rights". The First Amendment does not authorize defamation of a person or a business with "actual malice".

II

This case relates to a mercantile credit agency or credit reporting agency which is distinguishable from publication merely circulated to a restricted list of subscribers.

There is obvious reason to distinguish between a publication published to a restricted list of subscribers, generally, as might be the case with professional or trade journals, or information provided by investment advisors or broker dealers registered by the Securities and Exchange Commission, or political broadsides or letters, and the restricted publications such as the one here which for a fee proposes to provide in STRICT CONFIDENCE, contractually agreed to as not to be disseminated to third persons, information with regard to the credit and business reputation of selected persons. No "reference book" is involved in the record of this case and Dun and Bradstreet has not previously claimed to be a specialized news media

but specifically claims and offers secret and confidential reports and information contractually not to be in the "free flow of information".

In *Grove*, supra, the Third Circuit which authored the *Rosenbloom* Opinion, stated:

> "In the view we take of this case, moreover, there is a more fundamental flaw in defendant's attempt to clothe itself in the protective cloak of the *Times* standard. Based on a thorough review of the cases interpreting and applying the *Times* doctrine, we hold that the defendant's publication is not a medium entitled to that extended constitutional protection."

In the *Grove* case the court found a patent distinction between publications which disseminate news for public consumption and one which provides specialized information to a select, finite audience wherein by contractual stipulation each subscriber agrees that the information received is for the exclusive use of the subscriber and

> "such information shall be held in strict confidence and shall never be revealed or made accessible in any manner whatever to the persons reported upon or to any others." (P. 437)

The court in *Grove* further proceeded to analyze the difference in that the extended constitutional doctrine rests on the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest government policies, and that the parties defamed would have sufficient access to the means of counter argument to be able to expose through discussion the falsehoods and fallacies of defamatory statements. In the *Grove* case, as adopted by the Tenth Circuit in this case, the court has found

> "Plaintiff here is denied that opportunity to respond to such false assertions, both because it lacks the very

access to the medium which *Times* and its progeny assumed, and for the more pernicious reason, that the source or nature of the assertions may never be exposed."

D & B in this case is *claiming the right* with regard to one of their subscribers of more than twenty-five years' standing with whom they have had contacts every other month regarding that subscriber's debtor to *manufacture* out of whole cloth by use of employees whom they have neither trained nor concerned themselves with training or supervising, to falsely and secretly report to other subscribers that this respondent has been put in bankruptcy by the same debtor they have been watching for the subscriber. They have offered as a defense that they were almost right and that Kansas Electric probably should have been bankrupt anyhow, and, therefore, could not have been damaged by the libel!

Review of this action by this court looking toward acceptance of petitioner's proposed rule can only serve to grant license to defame at will and in secrecy the other industries and businesses which make up the commerce of this nation in a manner similar to that by which such damage was caused to respondent herein.

III

Petitioner suggests that the court should decide what types of damage awards are consistent with a libel made with actual malice as in this case.

The evidence here clearly shows that the management of D & B failed totally to make any effort to supervise, train, or prepare its employee for the responsible job of reviewing court proceedings and making reports as to what they said. Establishment of the rule now proposed by D & B would allow it to continue with impunity its total lack of concern previously demonstrated, and, in fact, to

allow it to rely upon the ignorance and lack of training, manuals, and supervision as justification for so-called "innocent" mistakes.

The suggestion of petitioner is that some actual specific dollar from some specific sale must be shown as damage.

A wise old Kansas Appellate Judge once remarked that "The cases must be very rare where the injury or destruction of a business by a libel can be directly traced to the mischief caused by the libel."

The damage award made in this case is well substantiated by the evidence which was carefully reviewed and approved by the Trial Court and by the Tenth Circuit as being sufficient in law to establish the actual damage resulting from the injury caused by the petitioner. This court has shown great concern with reference to damage and here is well within Mr. Marshall's and Mr. Stewart's opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S. Ct. 1811 (1971) that "damages can be awarded for more than direct pecuniary loss but must be related to some proven harm." The harm was proven here and punitive damages are peculiarly appropriate upon the acts of the petitioner in failing to establish any procedure for training or supervising their personnel. It would seem that the inducement of exemplary damages, although slight, could cause the petitioner to institute some kind of a program whereby reporters of court proceedings would appreciate the purpose and meaning of the caption of a law suit.

The jury properly gave general damage on the undisputed evidence of the general loss of profit sustained by respondent to the time of trial based upon the evidence of restricted credit, suppliers lost, and evaporated business —actual harm properly compensable and payable by the injuring party.

CONCLUSION

No conflict of decisions exists in the courts below and no generally important question to the American public or any broad range of publications is suggested by the petition. This case was tried and proven on the basis of actual malice and actual harm and only suggestions of special privilege for secret reports authorizing immunity from direct injury to the business community is suggested for review. We respectfully submit that the court should refuse petitioners's prayer for a Writ of Certiorari.

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Attorney for Respondent

of Counsel
Isaac A. Green

March 3, 1972

SUPREME COURT, U.S.
FILED
MAR 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-816

DUN & BRADSTREET, INC., a Delaware corporation,
Petitioner,

v.

KANSAS ELECTRIC SUPPLY COMPANY, INC.,
a Kansas corporation, *Respondent.*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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March 15, 1972

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF

Respondent's Brief in Opposition does not and cannot obscure the single, vital question here presented: Does the First Amendment as construed by *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964) and subsequent decisions of this Court apply to the publication of corporate credit reports?

The Tenth Circuit and the trial court explicitly held that "the rule of *New York Times* does not govern the instant controversy". Court of Appeals Opinion, Appendix A to Petition, p. 11a. They then proceeded to apply the Kansas law of libel which is materially and fundamentally at variance with the *New York Times* standards. In net effect and as applied in this case, the Kansas law of libel is indistinguishable from the

Pennsylvania libel law which this Court in *Rosenbloom v. Metromedia, Inc.* held to be in conflict with First Amendment requirements as implemented by *New York Times*, 403 U.S. 29, 91 S.Ct. 1811, 1816 *ff.* (1971). Both, under the shibboleth of "actual malice," invite the assessment of general and punitive damages for simple error and without proving that specific damages resulted from the publication of the erroneous report.

I. The Importance of the Question

Respondent's statement that "there is no generally important question to the American public to be determined herein" is patently unfounded. We are aware of at least fifty cases pending in various courts of the land which present precisely the same issues as the present case. There are undoubtedly many more.

The question, even narrowly considered with respect to corporate credit reporting, is of great importance to the public and to the Nation's economy. The type of information involved is of general public interest. It is usually reported by specialized publishers, but the importance of public access to it is attested by the fact that such information is also published in newspapers like the New York Times.

The principles at stake are also applicable to a vast variety of specialized publications, such as medical bulletins issued to doctor-subscribers; consumer reports on products, mailed only to subscribers; political "insider" letters, etc.

II. The Applicability of New York Times v. Sullivan

Respondent makes the strange argument that because no bankruptcy petition had in fact been filed against respondent, the report that such a petition had been

filed cannot be a statement of "general or public interest" within *Rosenbloom, supra*, 403 U.S. 29, 43, 91 S.Ct. 1811, 1818. This is obviously an argument without point or substance. *Cf. Ocala Star-Banner* v. *Damron*, 401 U.S. 295, 91 S.Ct. 628 (1971). Opposition, p. 10. It would mean that for a statement to be of "general or public interest", it must be true – i.e., non-libelous – in order to be protected by the First Amendment.

Under this Court's decisions, there is no longer room for doubt as to whether *New York Times* applies to the publication of commercial information. See Petition, pp. 11 et seq., and statements of this Court cited therein. A privately owned corporation engaged in public business, seeking the trust and patronage of the public, certainly exposes itself to the free and uninhibited circulation of information as to whether that trust should be given. See Petition, pp. 16 et seq.

Even if the publication were confined to subscribers, who presumably include persons and companies most acutely concerned, the publication is entitled to protection of the First Amendment as implemented by *New York Times*. (*Cf.* a medical journal reporting to subscribing doctors that a drug is dangerous. Petition, pp. 19 et seq.). Actually, respondent's complaint is that the accused report was in fact "widely circulated" (Opposition, p. 7), and certainly the jury's assessment of damages ($100,000 general and $50,000 punitive) must have been based on this premise.

III. The Impact of New York Times v. Sullivan

Respondent's Opposition does not state that the standard of *New York Times, supra*, was applied. It could hardly do so in view of the explicit disavowal by

circumscribe the meaning and substance of this Court's exposition of the First Amendment.

The courts below did not pretend to apply this Court's standard. The instructions given the jury did not, and did not pretend to, adhere to the *New York Times* requirements. It is idle to attempt to obscure these basic facts. Cf. *Rosenbloom* v. *Metromedia, Inc.*, *supra*. In fact, as in *Rosenbloom*, the instructions given to the jury under the state libel law were a boilerplate which in substance instructed and invited the jury to find liability for plaintiff's injury and to assess actual and punitive damages without the restraints of the "finer, more discriminating instruments of regulation" that, as a minimum, the First Amendment requires with respect to publications of matters of general interest.

IV. The Damage Question

Respondent does not directly argue that the judgment below can be supported by reference to any evidence of damage specifically attributable to the accused report (Opposition, pp. 11-13). Contrary to a totally unsupportable statement in the Opposition (p. 13), we reaffirm that there is not in the record a single instance of contractual credit, loss of customers or loss of business because of the erroneous report. It would be surprising if there were such evidence in view of the immediate correction of the report (cf. Douglas J., dissenting from denial of certiorari, *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 105 S. Ct. 2741, 2743 (1985)). The evidence in the record is precisely to the contrary and

The quote is from Justice Harlan's dissenting opinion in

the jury specifically found "no special damages".[3] (Petition, pp. 9, 23). "Special damages" as distinguished from "general damages" were defined in the instruction (No. 18, Appendix B, p. 18a) as "compensatory damages" which naturally, but not necessarily, flow from the wrongful act, such as loss of customers, loss of profits, diminution of trade, and such future business losses as can be shown with reasonable certainty".

These are exactly the type of damages which, according to the statements of members of this Court, are the *only* types for which damages should be awarded. See *infra*).

The fact is that the case was brought as "libel *per se*" (Opposition, p. 3). The jury was instructed that "damages arise *by inference of law* and are not required to be proved by a showing of specific harm since the law presumes such damages . . ." (Instruction No. 18). Punitive damages, the jury was instructed, are to be ganged "as punishment and as a warning to others against similar conduct". (Instruction No. 20).

It is our submission, on the basis of statements by this Court and various of its members, that the treatment of the damage question in this case presents im-

[3] At trial numerous representatives of manufacturers who sell to Kansas Electric testified uniformly that the Dun & Bradstreet publication did not result in the curtailment of credit to Kansas Electric. No evidence was introduced which would tend to indicate that any customer of Kansas Electric stopped buying from Kansas Electric because of the notice.

The record shows that Kansas Electric's decline in business began before the publication of the Dun & Bradstreet report. The record amplifies the proof of deteriorating business by evidence showing that Kansas Electric's salesmen complained to management of lost sales because of slow deliveries and non-competitive prices.

portant issues which are ripe for decision. These issues are apart from and in addition to the general question of the applicability and application of the standards of *New York Times* as to liability. The issues are as follows:

1. Where there is no evidence of loss or harm specifically following from the accused statement, may liability be imposed?

2. Absent evidence of damage specifically resulting from the publication, may "general damages" be assessed?

3. May punitive damages be imposed?

These are questions of the utmost importance. *Cf.* statements by individual Justices in *Rosenbloom* v. *Metromedia, Inc., supra:* White, J., 91 S.Ct. 1827; Harlan, Jr., 91 S.Ct. 1829, 1836: "I would hold unconstitutional in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done"; Marshall, J., with Stewart, J., concurring, 91 S.Ct. 1836, 1840 and *passim:* "I believe that appropriate resolution of the clash of societal values here is to restrict damages to actual losses".

Respectfully submitted,

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